

UNITED STATES OF AMERICA)
 VS) CASE NO: 5:16-cr-94-1
 BRIAN FOLKS)
 _____) MOTION HEARING

TRANSCRIBED BY: Anne Marie Henry, RPR
Official Court Reporter
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APPEARANCES CONTINUED:

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1 (The Court opened at 10:15 a.m.)

2 THE CLERK: Your Honor, the matter before the
3 Court is criminal number 16-94-1, United States of America
4 versus Brian Folks. Present on behalf of the government are
5 Abigail Averbach, Emily Savner and Jared Fishman. Present
6 on behalf and with the defendant are Craig Nolan and David
7 Williams. And we are here for a motion hearing.

8 THE COURT: All right. Morning. Good to see
9 everybody again.

10 MS. AVERBACH: Good morning.

11 MR. NOLAN: Good morning, Your Honor.

12 THE COURT: At the end of the day yesterday I got
13 a call from counsel from both sides who were together. They
14 brought to my attention a conflict of interest involving
15 defense counsel, which defense counsel hadn't been aware of
16 previously.

17 We talked about it for some time without a record,
18 just in a conference setting. And I said we'd take the
19 matter up this morning. And everybody would both give some
20 thought to it. And Mr. Nolan had given some consideration
21 to filing a motion to withdraw. I haven't seen that, but I
22 know there's not been much time either.

23 So why don't we start with the defense, Mr. Nolan
24 and Mr. Williams, where do we stand now?

25 MR. WILLIAMS: Your Honor, after I received word

1 on Tuesday night that one of my former clients was an
2 extremely important witness in this case, I notified the
3 prosecution and Mr. Nolan. And I told them I would have
4 nothing further do with that particular witness.

5 THE COURT: All right. So you represented the
6 C.I.?

7 MR. WILLIAMS: Yes.

8 THE COURT: Okay. And what's your intention on
9 going forward?

10 MR. WILLIAMS: I'm in the same boat as Mr. Nolan.
11 I would be unable to cross-examine her. Even if she were to
12 waive that conflict Mr. Folks isn't willing to waive that
13 conflict on his end.

14 THE COURT: Right.

15 MR. WILLIAMS: We spoke last night.

16 THE COURT: Okay.

17 MR. NOLAN: And I guess I should put on the record
18 I also have a conflict. It's one I believe that could not
19 be waived because of the professional relationship I have
20 with the C.I., whose name we got late on Tuesday. And I
21 realized yesterday, because we got one of the names and not
22 one of the other names, I put together two and two and
23 figured out ah, I know this woman, I have a professional
24 relationship with her.

25 We informed Mr. Folks, both of us, that we've had

1 professional relationships and I have a professional
2 relationship with the C.I..

3 THE COURT: Just so we have a complete factual
4 record, which is that you --

5 MR. NOLAN: Your Honor, my only concern about the
6 details is that -- see this is -- here's my problem. I'm
7 completely conflicted because, one, the government doesn't
8 want her identity known.

9 THE COURT: Right.

10 MR. NOLAN: Mr. Folks wants to know her identity,
11 of course, because he wants to confront his accusers.

12 THE COURT: Right.

13 MR. NOLAN: Because of my professional
14 relationship with her I can't advocate for the disclosure.
15 And I can't -- if we disclose the details I disclosed to you
16 that would make her readily identifiable.

17 THE COURT: I don't need to know the details, and
18 I'm just going to call her the C.I. today, but I just want a
19 record clear for another court in the future so they
20 understand the nature of your conflict, which I don't think
21 you represented her, but someone else, right?

22 MR. NOLAN: I represent someone else, yes. I am
23 reluctant to go beyond that because that will make her
24 readily identifiable.

25 THE COURT: You represented a relative?

1 MR. NOLAN: I represent a relative, yes.

2 THE COURT: Okay. All right. Fair enough.

3 MR. NOLAN: I just put on the record too that the
4 government and I called that person yesterday after we got
5 off with you, talked with her about some of these issues. I
6 believe the government was going to arrange to get her
7 counsel because, of course, the government was inclined to
8 have her waive the conflict, but they can't advise her to.
9 I can't advise her to or not to.

10 THE COURT: Right.

11 MR. NOLAN: And she expressed real concern about
12 identity being disclosed. So here I'm in a terribly
13 conflicted situation. My position is that we can't go
14 forward, neither Mr. Williams nor I can cross her, can
15 impugned the evidence that she's involved with, because of
16 at least my relationship with her, and that Mr. Folks
17 doesn't have confidence in us to attack that evidence, to
18 attack her directly or indirectly.

19 And that is part and parcel of the government's,
20 the government's drug case. And it's all, as they've
21 described, inexorably intertwined. So I do move to
22 withdraw. I cannot move forward as it's just untenable for
23 me.

24 THE COURT: No, I appreciate that. And does
25 Mr. Folks know the identity of the C.I. now or not?

1 MR. NOLAN: He does not. He does not. First of
2 all, the government hasn't -- we have an agreement with the
3 government not to identify that C.I. until, until you rule.
4 In fact, I filed an opposition to the motion in limine by
5 the government, one of which had -- one argument of which
6 had to do with the government's desire that she not be
7 publicly identified, that she testify with her alias name.

8 THE COURT: Right.

9 MR. NOLAN: I was all set to respond to that as
10 part of my response filed yesterday. I had to excise that
11 from my response, we dropped a footnote simply saying that
12 will have to be addressed at a later date. Why did I do
13 that? Because the duty's owed in her direction and not
14 being able to take a position on that.

15 THE COURT: All right.

16 MR. WILLIAMS: Your Honor, this was moving so fast
17 yesterday that when that motion was being prepared my name
18 was on it, the memo responding --

19 THE COURT: Right.

20 MR. WILLIAMS: -- that Mr. Nolan had prepared for
21 us on Wednesday that I asked his office not to put my name
22 on it because the draft did address that issue regarding the
23 C.I.. And it wasn't until probably about noon that I got a
24 call from Mr. Nolan asking me a question. And that's when
25 we put two and two together. This is all happening less

1 than 24 hours ago.

2 THE COURT: Okay.

3 MR. WILLIAMS: And I would move to withdraw as
4 well. I don't see how the government can try the drug
5 conspiracy without any reference -- it has to be no
6 reference at all to the C.I. because we are prohibited from
7 attacking any underlying motive, opportunity, anything that
8 may have happened with regard to the informant.

9 And the government got joinder on the conspiracy
10 and drug counts because, under the rule, it's so intertwined
11 that they would be tried together. And I think any attempt
12 to say we can, we can move to sever those and maybe try them
13 later would be improper because my client has a right to a
14 fair and speedy trial. And to sever those counts from the
15 conspiracy would deny him that right on those four counts.

16 THE COURT: All right. Thank you. I appreciate
17 your perspective, both of you.

18 Miss Averbach, from the government's side?

19 MS. AVERBACH: Thank you, Your Honor. Good
20 morning.

21 THE COURT: Good morning.

22 MS. AVERBACH: I think we can make accommodations
23 to avoid the conflict or the appearance of a conflict in its
24 entirety. And the government is prepared to make those
25 accommodations if we are going forward on Monday as the

1 government would like to. Our witnesses are poised to
2 testify. The government is ready to proceed on Monday.

3 The accommodation the government suggests is that
4 we sever the four distribution counts. We not call this
5 person as a witness. We use evidence related to those
6 controlled buys only inasmuch as we have recordings of a
7 cooperating co-defendant who will take the stand who could
8 authenticate a video or an audio recording, say that's me,
9 that's me selling drugs, that's me selling the defendant's
10 drugs, and limit it to that.

11 The confidential source's credibility is not in
12 question. Whether or not she did or did not deliver drugs
13 to DEA after that transaction is totally irrelevant.

14 I think it avoids the conflict in its entirety.
15 And I think it's a reasonable solution under the
16 circumstances given the timing of this.

17 The government is prepared to do that if Your
18 Honor is inclined to move forward on Monday or, you know,
19 within a very reasonably short time thereafter.

20 If Your Honor is inclined to continue the case for
21 a substantial amount of time we would elect not to do that.
22 Mr. Nolan should be relieved, somebody else should be
23 appointed in his stead and we'll proceed then.

24 THE COURT: So let me ask you to repeat what
25 you're saying. The confidential informant was the

1 controlled purchaser for all four distribution counts,
2 right?

3 MS. AVERBACH: That's correct. The ones this
4 defendant is charged with.

5 THE COURT: And then there's a fifth possession
6 with intent to distribute, and is she involved in that or
7 not?

8 MS. AVERBACH: Not at all. And then there is a
9 conspiracy count which relies on her not at all. The
10 witnesses who will testify about the conspiracy, most of
11 them have never met her, don't know her.

12 THE COURT: Right.

13 MS. AVERBACH: We weren't going to elicit
14 testimony from that witness about the conspiracy outside of
15 the four controlled buys.

16 So the government is fully confident in it's
17 ability to prove drug conspiracy, possession with intent to
18 distribute and the other, you know, the firearms count and
19 the human trafficking. And they are inextricably interwoven
20 and we don't want to proceed on, you know, the sex related
21 counts without the drug related counts because of reasons
22 we've previously articulated.

23 THE COURT: So those four transactions in which
24 the C.I. was involved would simply not come into evidence?

25 MS. AVERBACH: Only inasmuch as the cooperating

1 co-defendant would authenticate video and audio taken during
2 the time of those buys and say that is me, that is me
3 selling drugs and those drugs were the defendant's drugs.

4 THE COURT: Oh, the cooperating co-defendant is
5 the person on the other side of the hand-to-hand exchange
6 for the C.I.?

7 MS. AVERBACH: That is correct.

8 THE COURT: He or she's the person that met the
9 C.I. to sell the drugs?

10 MS. AVERBACH: That is correct.

11 THE COURT: How does that change your position?

12 MR. WILLIAMS: Your Honor, it doesn't. I mean,
13 how can we cross-examine this person about a video or audio
14 without talking about the person that she allegedly met?
15 Maybe those two people had a, had a relationship beforehand
16 and this has nothing to do with the conspiracy.

17 I mean, think, just think about it. I mean, I'm
18 just talking off the top of my head because this is the
19 first I've heard about this crazy plan. You can imagine and
20 spin off the kind of cross-examination you could do of, I
21 think I know who it is M.L., you had a prior relationship
22 with the informant, you set this up, blaw, blaw, you know,
23 --

24 THE COURT: Well, let me ask Miss Averbach this,
25 you are planning to sever the four distribution counts,

1 that's your proposal?

2 MR. WILLIAMS: That's their proposal.

3 THE COURT: Yeah. Yeah. Let me work with her for
4 a second.

5 MS. AVERBACH: That's my proposal, yes.

6 THE COURT: And so why are we even hearing about
7 those four transactions in this case since they'll be
8 subject to later trial with different counsel?

9 MS. AVERBACH: Well, because there are no double
10 jeopardy considerations at play and they are proof of the
11 drug conspiracy.

12 THE COURT: Yeah, but isn't the cost, isn't the
13 price of solving the conflict problem that we don't hear
14 anything at all about these four counts until, until there
15 is new counsel and a new trial in a separate proceeding?

16 MS. AVERBACH: I think we can resolve the conflict
17 with a reasonable accommodation that doesn't involve any
18 reliance on this person whose causing the conflict, the
19 relationships involving her.

20 Whether or not the person whose going to admit to
21 selling drugs sold drugs to somebody she knew previously or
22 didn't know previously I, frankly, think is irrelevant. And
23 they can cross-examine her on whether or not she's a
24 credible person whose testifying truthfully as to whether or
25 not she's selling drugs and those drugs belonged to the

1 defendant's drug trafficking organization.

2 That doesn't have anything to do with whether or
3 not the confidential informant is a credible person worthy
4 of belief in this proceeding or any other proceeding at
5 which I think is the concern. It's completely out of the
6 picture. It's just proof that this defendant was working
7 with other people, i.e., M.L., to distribute controlled
8 substances. And we have that on video. And that would be
9 the sole purpose of its introduction.

10 MR. WILLIAMS: The question is, how did you meet,
11 how did you set up the deal. There's phonecalls between
12 these two people. I mean, it's no accommodation at all.

13 THE COURT: Either it's severed or it's not.
14 We're not going to -- in other words, they would be in the
15 same position of trying to ask hard questions about their
16 client, their former client or their, the current relative
17 of an existing client. And they are, I mean, I appreciate
18 the effort, and I think if you sever the entire thing and we
19 try the distribution counts on another day, I think that
20 solves the problem, right?

21 MR. WILLIAMS: If we sever the entire drug --

22 THE COURT: No, we sever the four counts and the
23 government agrees not to put in evidence about the, about
24 those four purchases until a trial could be scheduled, a
25 separate trial not involving you two on those four charges.

1 MR. NOLAN: All the evidence, all the references,
2 anything connecting M.L. to the informant, they can't use
3 the drugs, they can't use the videos, they can't have anyone
4 talking about those, that relationship. It taints,
5 frankly -- we still have to be able to cross M.L. and part
6 of M.L. --

7 THE COURT: Is M.L., I'm sorry, is M.L. the C.I.?

8 MR. NOLAN: No, I'm sorry. M.L. is the alleged
9 co-conspirator with --

10 MR. WILLIAMS: How can we cross-examine M.L. and
11 leave out the alleged sales? This is crazy.

12 MR. NOLAN: M.L. sold, allegedly sold the drugs,
13 was allegedly working with Mr. Folks to sell the drugs to,
14 we'll call her Nikki, rather than using M.'s, Nikki the
15 C.I..

16 THE COURT: Right.

17 MR. NOLAN: And so our entire ability -- they
18 have -- they had a relationship. And so any -- we would be
19 crossing M.L., whether she's talking about those same
20 transactions or not, with regard to her relationship with
21 M.N. It's all --

22 THE COURT: Who is M.N.?

23 MR. NOLAN: Nikki.

24 THE COURT: Just call her the C.I..

25 MR. NOLAN: The C.I.. So what the government --

1 the government is seeking to slice this too thin. And,
2 frankly, it's slicing it too thin on a case that already has
3 a difficult track record that's addressed in the other
4 motions.

5 As I said yesterday in chambers or over a
6 phonecall in chambers, if the government -- the government
7 should sever the entire drug case from this if they, if they
8 want us to be able to perform as we should and for Mr. Folks
9 to have confidence in us that we will attack the drug case,
10 attack M.L. the seller appropriately, based on her
11 relationship with the C.I..

12 I mean, it's just untenable to do that. Not to
13 mention, as Mr. Williams mentioned, frankly, you know,
14 Mr. Folks does have speedy trial rights. He doesn't have to
15 agree to a Speedy Trial Act exclusion with regard to
16 severance of the drug case.

17 So it's a mess. What I would think the
18 resolution, they ought to dismiss the entire drug case, go
19 forward on human trafficking, which is much more serious
20 charges anyway.

21 THE COURT: There's a piece that I want to make
22 sure I understand. There's a variety of evidence on the
23 drug conspiracy side.

24 MS. AVERBACH: That's correct.

25 THE COURT: And I'm hearing from the government

1 that these four distribution events aren't going to be part
2 of that, are not necessary to that evidence?

3 MS. AVERBACH: That's correct, Your Honor. Let me
4 slice it a little less thinly, if you will.

5 THE COURT: You can prove your conspiracy without
6 these four distribution events?

7 MS. AVERBACH: And we'd be happy to do that if you
8 let us go forward.

9 THE COURT: So if they do that then why would,
10 when the co-defendant who is cooperating gets up to testify,
11 why would you -- you would be the only people then who would
12 be introducing the CI's involvement with him because we'll
13 hear nothing in the government's case in chief about the
14 C.I., we'll hear nothing about the four distribution events,
15 and then you feel you would be duty bound to introduce that
16 evidence on cross-examination?

17 MR. NOLAN: So two-fold, Your Honor. One, unless
18 the government has just pivoted what they actually said is
19 we don't want to, we're not going to try him on the four
20 drug distribution counts, but we're going to put in half of
21 the evidence on those four distribution counts.

22 THE COURT: No. We're, they had -- with a little
23 bit of prodding and encouragement I think they have evolved.
24 And I don't hear them saying that they are going to put in
25 the tapes, that they are going to try and put in half the

1 evidence. They are going to leave those four distribution
2 buys out of their case, right?

3 MS. AVERBACH: That's correct, Your Honor.

4 THE COURT: So if those four are left out of the
5 case they are going to put in no evidence about the C.I. and
6 at that point why do you?

7 MR. NOLAN: Because defense counsel must attack
8 M.L.. M.L. is going to come in and she's going to testify
9 about the drug, the drug conspiracy.

10 THE COURT: Yes.

11 MR. NOLAN: Including her involvement, to some
12 extent, on the drug conspiracy.

13 THE COURT: Right.

14 MR. NOLAN: And she's going to do it generally.
15 She's not going to be able to talk about those four buys.
16 We have to be able to attack her based on her relationship
17 with a drug buyer who is their C.I.. We are duty bound to
18 attack M.L.'s testimony on the drug conspiracy as a whole.

19 These are all, these are all acts done in
20 furtherance. And even though we wouldn't be sort of talking
21 about these acts, it doesn't matter. It's the relationship
22 between M.L. and the C.I..

23 Now, if the government wants to not put on any
24 evidence by M.L. regarding drug conspiracy then that --

25 THE COURT: No, that's not the offer. The offer

1 is that they won't put on any evidence involving the
2 purchase by the C.I.. That will become, for purposes of
3 this case, sort of uncharged conduct involving prior bad
4 acts by M.L. That she sold to the C.I. on, on other
5 occasions. And you think you have to get into that in and
6 that you're entitled to?

7 MR. NOLAN: Not only are we entitled to, we are
8 duty bound to attack M.L. with regard to her testimony as to
9 the drug conspiracy. And part of that will be attacking her
10 relationship with, with the C.I..

11 And, again, let me just state on this record, had
12 I been notified at the time I was assigned that M.N. was
13 this particular person, I would never have accepted the
14 assignment.

15 THE COURT: No, I get that part.

16 MR. NOLAN: And so they are asking -- they are
17 asking us to defend Mr. Folks with one arm strapped behind
18 our backs. It's, we're already in a difficult position and
19 as we've laid out. And it's untenable, Your Honor, that we
20 should have any limitations on our ability to attack their
21 witnesses.

22 I think they could get rid of the drug case. They
23 don't have to today, but they, but they could. If they
24 wanted to solve the problem and move forward on human
25 trafficking the only way to do it is to, is to get rid of

1 the drug case for purposes of my representation and Mr.
2 Williams. And I'll defer to him at this point because we
3 have different conflicts here.

4 MR. WILLIAMS: Well, I was thinking just now M.L.,
5 the co-defendant who is cooperating, is going to come in and
6 testify, I suppose, I was involved in this charged drug
7 conspiracy because I was bagging, weighing, oh, and I was
8 selling drugs.

9 THE COURT: Right.

10 MR. WILLIAMS: Oh, and now we can't cross-examine
11 that person about the sales? I mean, it's crazy. Our, if
12 she was -- she's going to say I was selling drugs for Brian
13 Folks. Oh, okay. We won't ask you any questions about
14 that. We can't do that. How could we possibly defend and
15 cross-examine this witness about the sales?

16 MR. NOLAN: Whether she mentions she was selling
17 for him or not, we have to attack her for being a drug
18 dealer. They put us in an impossible situation.

19 MS. AVERBACH: Your Honor?

20 THE COURT: So your line of inquiry would be that
21 regardless of whatever Mr. Folks has done the bad drug
22 dealer is the cooperating co-defendant and here's an example
23 of four sales that she made all by herself, like that? Is
24 that what you're saying?

25 MR. NOLAN: That is, that is what, that is

1 potentially what the next other counsel could do.

2 THE COURT: Right.

3 MR. NOLAN: That is an example of that.

4 THE COURT: Yeah, okay.

5 MR. NOLAN: I mean, it's, she -- and then, you
6 know, she's going to give other testimony too. And we would
7 attack her, even if she's not talking about drug dealing, if
8 she's talking about human trafficking and other
9 observations, whatever they may be outside, we're going to
10 attack her for her bad character, her, you know, all sorts
11 of things. But it's, it's -- including drug sales that
12 related to the C.I.. So it's impossible.

13 MR. WILLIAMS: And, I mean, just walking on
14 eggshells. She's not my witness, but I can't even imagine
15 what it would be like cross-examining somebody and
16 potentially opening the door and then suddenly you're in
17 violation of professional conduct rules, you are subject to
18 2255. The government now says you opened the door and we're
19 going to talk to this witness about all the sales you did
20 do. It would be, believe me Judge, impossible.

21 And I've been doing this a long time. And I've
22 never had those kind of constraints put on me
23 cross-examining a C.I., government cooperating witness,
24 whatever. It just can't be done.

25 MS. AVERBACH: May I, Your Honor?

1 THE COURT: Of course.

2 MS. AVERBACH: I think if you accept this theory
3 that they have to cross on the underlying relationship
4 between the drug seller and the drug purchaser they have --
5 what they are saying is that that relationship matters to
6 whether or not those sales actually occurred and, therefore,
7 they are going to cross-examine on the relationship between
8 those, this drug seller and every other single drug
9 purchaser. And that, frankly, never happens. It's not
10 required. It has nothing to do with the conspiracy.

11 The conspiracy itself is concerned with whether or
12 not there was an agreement between the drug seller and
13 whoever else she or he is working with. And the
14 relationship with the buyer is irrelevant to whether or not
15 there were parties who agreed to distribute controlled
16 substances which is what conspiracy is about.

17 In this case there is actually no relationship
18 between the confidential source and the cooperating
19 co-conspirator. That's clear.

20 THE COURT: Let me catch up with you. Between the
21 C.I., there was no -- I thought the C.I. purchased drugs
22 from the, from M.L..

23 MS. AVERBACH: Yes. Because --

24 THE COURT: There's a relationship.

25 MS. AVERBACH: Well, you can tell they don't know

1 each other because they introduce themselves to each other.
2 Right. They don't know each other. There's no pre-existing
3 relationship that they are saying they want to probe.
4 There's been no proffer of a pre-existing relationship. And
5 I don't believe one exists.

6 Over time, as they had subsequent transactions,
7 they recognized each other. They are not friends. There's
8 no relationship at all --

9 THE COURT: I know, but they are not limited by
10 your theory of the case.

11 MS. AVERBACH: No, of course. But I'm just saying
12 there's been no proffer from them as to any sort of
13 relationship that would have an impact on that person's
14 credibility. So I think it's a red herring.

15 You know, these are very skilled attorneys who,
16 like the government, always have to tread carefully where
17 there are motions in limine prohibiting prejudicial
18 information. We are always worried about opening the door
19 to different things as are the defense.

20 And I do believe that these two highly competent
21 defense attorneys can navigate this with ease. They are
22 very adept in the courtroom. I don't think there will be
23 any problem if we agree reasonably to pursue the case only
24 on the conspiracy without eliciting any testimony about any
25 of the buys that involve this person.

1 We are going to ask the co-conspirator who is
2 cooperating what her role was in the drug organization, who
3 she worked with, how the drug organization worked, and what
4 she did. Among the things she did was she distributed
5 heroin primarily, sometimes crack cocaine, to all sorts of
6 drug purchasers, one of whom happens to be this person.

7 We will not bring that out. We will instruct our
8 witness not to offer it. It's irrelevant to whether or not
9 there was an agreement between the defendant and the person
10 whose on the stand and anyone else who is charged or
11 uncharged to distribute narcotics in this area.

12 THE COURT: Here's the part that's hard for me to
13 get into focus. On this you're in agreement, the government
14 says that M.L. sold to lots of people, you want to establish
15 that M.L. sold to lots of people.

16 Do you have a different view as to what her role
17 is? The government says she's just one conspirator among
18 several. One theory of your case may be that she's the
19 mastermind behind all this. I don't know. But you would
20 assign larger responsibility, but why is it that since both
21 sides agree that she's involved in hand-to-hand sales, why
22 do you have to choose these four to inquire about? You
23 could almost stipulate that M.L. was an active hand-to-hand
24 dealer. It doesn't seem to me a stone that necessarily your
25 representation has to fall on.

1 MR. NOLAN: Your Honor, M.L. is a cooperating
2 co-defendant.

3 THE COURT: Right.

4 MR. NOLAN: She is a very damaging witness to our
5 client.

6 THE COURT: Right.

7 MR. NOLAN: Our client faces life imprisonment or
8 decades in prison --

9 THE COURT: Right.

10 MR. NOLAN: -- based on the mandatory minimums.

11 THE COURT: Right.

12 MR. NOLAN: The government is here, first of all,
13 now we're asking -- we're being essentially requested to
14 disclose our theories of defense which, of course, makes it
15 more difficult to defend. And there's no obligation on us
16 to do that, unlike the government's obligation to disclose
17 evidence.

18 We have to be able to attack M.L. each and every
19 way that we think is appropriate. And part of that involves
20 the C.I.. And I can't lay out every different scenario
21 here. M.L. would take the stand, it's a moving target
22 during trial, and there is no comparison between the
23 government's risk of opening the door and our ethical duty
24 to represent Mr. Folks who faces decades or life in prison.

25 We have very different jobs. We also have a

1 concern with regard to the Code of Professional
2 Responsibility in a way that just doesn't impact the
3 government. So the prosecutors don't have any risk here
4 other than they open the door and there's a mistrial and
5 resources have been wasted. Our risk is far greater for
6 Mr. Folks and for ourselves.

7 Again, I think it's untenable. I can't cross
8 M.L., I can't cross the C.I. and neither can Mr. Williams.

9 THE COURT: In other words, you can't cross M.L.
10 without bringing in the C.I.?

11 MR. NOLAN: Yes.

12 THE COURT: And why is that exactly? I'm not
13 asking you in a confrontational way. I'm asking because I
14 don't understand it.

15 MR. NOLAN: We have to be able to attack the
16 conduct that involved -- attack her vis-a-vis the conduct
17 that involves the C.I.. And that is just not something that
18 we can do.

19 After all, it's some of the best evidence, right,
20 that we have about M.L.'s bad conduct. The government's
21 turned it all over to us.

22 THE COURT: Right.

23 MR. NOLAN: And, again, --

24 THE COURT: Oh, because you have the tapes and
25 things like that?

1 MR. NOLAN: Yeah, we have the tapes and all that.
2 So, you know, we know about those. That's a good source of
3 cross-examination. And I would expect that if there were
4 different counsel sitting at this table they would have
5 different options on how to defend Mr. Folks.

6 They are slicing this too thin. It's untenable.
7 And we're only here because the government disclosed the
8 witness on Tuesday.

9 THE COURT: All right. You have no interest in
10 severing the sex and trafficking in gun charges from the
11 drug conspiracy?

12 MS. AVERBACH: No, Your Honor, we don't.

13 THE COURT: Okay.

14 MS. AVERBACH: They are inextricably interwoven
15 and we do plan to try those two things together.

16 I just want the record to be clear that the
17 witness list has always included initials for this
18 particular witness from the beginning of time. And there
19 was always an invitation made explicit in the letter of
20 April 5th to defense counsel that we would be happy to share
21 the name of that witness with counsel so they could
22 investigate and for any other purpose. That request never
23 came.

24 So ultimately we -- once we were having our
25 chambers conference the other week I said we'd be -- again,

1 we would be happy to share the name of this person for
2 counsel's eyes only. And they said, Craig said, yes, we'd
3 like that. And so I e-mailed it to them, admittedly a
4 couple days later, because it slipped my mind given all the
5 other things that were going on in this case.

6 But, you know, they've had, they've had an ample
7 opportunity to ask. And so the suggestion that somehow the
8 government is at fault here by making a late disclosure I
9 think is not accurate.

10 MR. WILLIAMS: We would have been doing this three
11 weeks ago then. I mean, we, if they gave us the name I
12 would have recognized it immediately. Mr. Nolan may not
13 have recognized it until noon yesterday. And we couldn't
14 have talked to our client about it.

15 THE COURT: You mean because of a married name
16 change?

17 MR. NOLAN: Because I know her by the married
18 name. We are not saying that the government did anything
19 unethical, but the government does have the duty to disclose
20 witnesses. It's an affirmative duty under -- in this
21 district. And, you know, they could have disclosed it on
22 April 5th to us. They decided to withhold it. But as Mr.
23 Williams said, so we would have been here on April 6th or
24 whenever I --

25 THE COURT: I don't understand why April 5 is an

1 issue. This is information that's been known for two years,
2 right? This is nothing new.

3 MR. NOLAN: To the government.

4 THE COURT: To the government, yeah.

5 MR. NOLAN: Well, yeah, she's their C.I..

6 THE COURT: Right.

7 MS. AVERBACH: This is not new information to us.
8 We gave our witness list over recently in anticipation of
9 trial. I'm not sure when her initials first appeared on the
10 witness list. I think it was well in advance of April 5th,
11 but on April 5th in a letter we again told the defense
12 counsel in writing we are happy to share the identity of
13 this person. It's not as if we sprung this on them last,
14 you know, two days ago, which I think is the picture being
15 painted here.

16 MR. NOLAN: It would have made no difference. We
17 would have been here on April 6th. As soon as we figured
18 out who she was we would have brought to the government and
19 the Court's attention, like we did yesterday, and you could
20 not have appointed new counsel at that point and have them
21 try the case starting Monday obviously.

22 So we're in no different position than we would
23 have been on April 6th.

24 THE COURT: All right. I don't think I have any
25 alternative except to grant the motions to withdraw and find

1 new counsel and reschedule the trial.

2 I will say this, I think it was an instance of
3 poor judgment on the part of the prosecution to withhold the
4 name of the critical witness on the four distribution
5 counts. The consequence is that defense counsel and the
6 Court did not learn of a conflict of interest for months.

7 The prosecution placed the interest of the
8 investigating agency in concealing its C.I. ahead of the
9 interest of the Court in ensuring a fair trial. But that
10 should never happen again in this Court.

11 The integrity of the legal process has to be a
12 shared priority, as important to the prosecution as it is to
13 the Judge. And in this instance, as I understand what
14 happened, the prosecution chose the short-term advantage of
15 trying to save the confidential informant for another day
16 over the constitutional requirement of a legal defense free
17 of a conflict of interest.

18 This should not have been kept a secret for all
19 these years. And I thought I was going to deal with it
20 today in the context of the jury selection. I was going to
21 come out in exactly the same way that in an American
22 courtroom people come in, they say their name, they testify
23 and make certain that jurors don't live next to them.

24 I had, frankly, not appreciated the possibility
25 that both attorneys might have unrelated professional

1 involvement with the C.I., but it's the same, it's the same
2 consequence.

3 So we've lost three weeks of trial time. Over a
4 hundred potential jurors gave up next Monday to come in to
5 court next week. I've held a prosecution witness in jail
6 for two nights for no purpose.

7 Frankly, your colleagues on both sides, including
8 other prosecutors and other defendants in this Court, are
9 disadvantaged because cases scheduled for the fall will have
10 to be pushed off. The Court will essentially go dark for
11 three weeks.

12 And I really think this is an occasion that all
13 three of you at the prosecution table have to think hard
14 about in reflecting about your priorities in making
15 decisions and making judgments in cases like this. I don't
16 have more to say on that.

17 My usual practice is to keep out of the lawyers'
18 way while they prepare their case. That's the way I liked
19 to practice. I liked to see the judge when I had a motion.
20 I didn't want him or her in my business while I was
21 preparing. That's not been working well in this case.
22 Every time we get closer to a trial date, and I've set
23 several, there's been a problem. And that's not only on the
24 prosecution, both sides, not these lawyers, but both parties
25 have created trouble that's required rescheduling.

1 So what I'm going to do going forward, I'll get a
2 new attorney, pair of attorneys for Mr. Folks, give them the
3 time they need to get up to speed. We're going to set up a
4 process with a monthly status conference with both sets of
5 lawyers to make sure that discovery is provided and that
6 Mr. Folks is getting access to his materials.

7 I'll speak with the marshals about setting up a
8 process where he can review the voluminous material in this
9 building under supervision. Just leaving it to the two
10 sides to develop an agreement has not been effective. But
11 we'll talk about that in the future once we have new
12 counsel.

13 I'll thank Mr. Nolan and Mr. Williams for their
14 service in this case. Mr. Nolan, in particular, dropped his
15 other projects what, eight weeks ago, whenever it was, when
16 the Court called for his help. They represented Mr. Folks
17 with a lot of skill and energy. I'll miss their
18 participation. Do my best, Mr. Folks, to match their level
19 of accomplishment. And I have some candidates in mind.

20 But I think that's as much as we can say. So
21 we'll have to cancel the trial, reset it late summer, early
22 fall. And I'm disappointed in the outcome. Okay.

23 MR. WILLIAMS: Your Honor, I was thinking about
24 this last night in anticipation of something like this
25 happening. We, Mr. Nolan and I have done nothing, at least

1 I haven't done anything for the last month but prepare for
2 the trial.

3 THE COURT: Yeah, I understand.

4 MR. WILLIAMS: And I just want to be able, --

5 THE COURT: I'm not quite there, but I'm not too
6 far behind you.

7 MR. WILLIAMS: -- with the Court's permission, to
8 work with successor counsel to share what I've learned.

9 THE COURT: Yeah, of course.

10 MR. WILLIAMS: If that's okay with you.

11 THE COURT: That's fine. And that will be
12 reflected in the vouchering system.

13 MR. WILLIAMS: Because I expect to spend days
14 going over thousands and thousands of pages with --

15 THE COURT: Yeah.

16 MR. WILLIAMS: It would save everyone a lot of
17 time in the long run, if that's okay with you.

18 THE COURT: No, I'll anticipate that.

19 MR. WILLIAMS: And Mr. Folks, I'll talk to him
20 about that as well.

21 THE COURT: Yeah. All right. Anything else we
22 can take up?

23 MS. AVERBACH: Your Honor, I think there is the
24 matter of the material witness and the --

25 THE COURT: I'm just going to release her. What

1 else can I do? I can't keep her for the summer.

2 MS. AVERBACH: Well, we will depose her with Your
3 Honor's permission, of course.

4 THE COURT: I'll have to let her lawyer know where
5 matters stand. And that's -- he's made the motion for her
6 deposition.

7 MS. AVERBACH: Correct.

8 THE COURT: And that's his call. That was, that
9 was the consequence of her detention. There isn't a basis
10 for her detention today. If he wants to go forward with a
11 deposition, as he moved, that's his call, but I'm not going
12 to tell him that I don't have a trial date, but I still want
13 you to do the deposition. It's his choice to come forward
14 on that under the rule.

15 MS. AVERBACH: I understand what you're saying,
16 Your Honor. I think, you know, I think her unavailability
17 for trial, whenever that date shall be, hasn't changed.

18 THE COURT: Right.

19 MR. NOLAN: Your Honor, just a practical
20 consideration, the government is seeking to depose her now
21 to use that at trial as I understand. Mr. Folks and his now
22 counsel would have to be present for that.

23 THE COURT: Yeah, yeah, I get it. I don't think
24 the deposition is going to happen. It wasn't the government
25 that wanted to depose her.

1 MR. NOLAN: Right. It was her counsel that wanted
2 to depose her.

3 THE COURT: It was her counsel wanted to depose
4 her in lieu of her waiting in prison for a week until she
5 could testify. The latter issue is off the table. And the
6 parties can always stipulate to a deposition I suppose if
7 they like, but I can't say that she's unavailable for a date
8 that I don't even know what it is.

9 So I, I will let Mr. McLaughlin, right, know about
10 this circumstance. And then he can be in touch with
11 Miss Averbach with him and talk about it further. But he
12 doesn't have the pressure on his client that he did an hour
13 ago.

14 All right. Mr. Folks, we kind of left you out of
15 the conversation. There's absolutely no obligation for you
16 to say anything, but if you had a view I'd be glad to hear
17 it.

18 MR. FOLKS: Can I confer with my attorneys first?
19 (Defendant conferring with his attorneys off the
20 record)

21 MR. NOLAN: You wanted Mr. Folks' perspective on
22 your --

23 THE COURT: I just wanted to give him that
24 opportunity since the question of legal representation is on
25 the table. And I didn't want to foreclose him. There's no,

1 I'm not asking for him to say anything at all. I think he
2 understands what's happened and I'll leave it there.

3 MR. NOLAN: He does want to say something very
4 short.

5 THE COURT: Of course.

6 MR. FOLKS: Yeah, I understand. I don't have any
7 objection to what you are proposing.

8 THE COURT: Okay. Fair enough. Thanks. Okay.
9 We'll get on to the next case. Thank you.

10 (The Court recessed at 11:00 a.m.)

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C E R T I F I C A T E

I, Anne Marie Henry, Official Court Reporter for
the United States District Court, for the District of
Vermont, do hereby certify that the foregoing pages are a
true and accurate transcription of my shorthand notes taken
in the aforementioned matter to the best of my skill and
ability.

A handwritten signature in cursive script that reads "Anne Marie Henry". The signature is written in black ink and is positioned above a horizontal line.

Anne Marie Henry, RPR
Official Court Reporter